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IN THE

Supreme Court of the United States

October Term, 1956.

No. 23

CLINTON E. JENCKS,

Petitioner,

vs.

UNITED STATES OF AMERICA.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

PETITIONER'S REPLY BRIEF.

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PETITIONER'S REPLY BRIEF.

The object of this Reply Brief is to correct impressions created in the government's brief concerning the key facts in the case which shape the posture of the question presented for decision and to comment upon the underlying policy and legal considerations raised by the argument of the United States. For ease of cross-reference we will subdivide this brief into the same points presented in Petitioner's Opening Brief.[1]

[1] "R." will refer to the printed record of the trial; "H." to the printed record of the hearing on motion for new trial; "Pet. Br." to petitioner's Opening Brief; "G. Br." to the brief of the United States.

POINT ONE.

The F.B.I. Reports Prepared by Matusow Contemporaneously With the Transactions They Record Should Have Been Produced to the Trial Court in the Manner and for the Purposes Described.

We confine this discussion to the Matusow reports although much of what is said would apply also to the Ford reports. Upon the trial record alone Matusow's testimony was more important than Ford's, and the subsequent motion for new trial gives to the Matusow reports an overriding importance in this area of the case.

(a) The Setting of the Requests.

These are reports made by Matusow contemporaneously with the transactions they purport to record and pursuant to the instructions of his employer, the F.B.I. They cannot be described in the government's words as "reports by or concerning [a government witness]." (G. Br. 26.) These reports are Matusow's statements and have a standing as extra-judicial declarations equivalent to an affidavit or signed statement given to an investigator. (*Compare, Gordon v. United States,* 344 U. S. 414; *United States v. Krulewitch* (2 Cir.), 145 F. 2d 76.) They are not reports *about* Matusow, prepared by others, and they are not the work product of any government agent, whether investigator or lawyer. These statements of the witness Matusow were prepared as records and reports of the transactions with the petitioner which were related in his testimony at the trial.

It is also important to emphasize that the reports which were the subject of petitioner's motion at the trial were the same reports which were the subject of petitioner's motion at the hearing. [See R. 295, 296; H. 663.] On each occasion the same documents were requested, re-

lating to the same transactions, Matusow's testimony concerning which had afforded the basis for petitioner's conviction.

Petitioner did not seek a large number of documents, nor a general exploration of the government's files. The period of Matusow's stay at the guest ranch where he purportedly had the conversations with petitioner was approximately three weeks. [R. 244-246.] Since he reported at least once a week [R. 290], the number of his reports could not have been far in excess of three. Moreover, petitioner requested only those portions of the statements dealing with the incidents recounted in the witness' direct testimony.

Finally, it is to be emphasized that the request made here was for the production of the documents to the trial court. It was asked that only those portions of the reports which the court found contradicted the direct testimony be furnished to the accused.

(b) The Importance of Matusow's Testimony at the Trial.

Because the importance of the witness to the prosecution has loomed large in decisions in this area (*Gordon v. United States, supra,* p. 417; *Fisher v. United States,* 9 Cir., 231 F. 2d 99, 104; *United States v. Krulewitch,* 2 Cir., 145 F. 2d 76, 77), it is necessary to examine closely the importance of Matusow to the prosecution. This will be evaluated in terms, first, of his providing the only post-affidavit evidence dealing with membership and affiliation, and, second, of the probative effect of what he said.

We directly controvert the government's assertions (G. Br. p. 27, n. 11) that there was other post-affidavit evidence. Matusow's is the only probative post-affidavit tes-

timony. There was no such other evidence which as a matter of law was probative on the issues of membership or affiliation. Ford's testimony was that up to September 1950 no "disciplinary action [was] taken by the Communist Party against the defendant, Clinton Jencks . . . in the presence of the defendant." [R. 119.] This has no value to show that petitioner remained in the Party. It does not say that Jencks was not expelled or removed from the Party by its action not in his presence. It does not purport to cover termination of his membership by withdrawal or resignation. Ford also testified that in the same period Jencks was not "replaced in his position on the State Board of the Communist Party." [R. 133.] That he was not "replaced" in no wise proves that petitioner continued in the position. In short, this testimony does not add one jot to Ford's evidence that he last saw Jencks at a meeting in late July or early August 1949.[2] [R. 194.] That was eight or nine months before the affidavit was signed and filed.

Another scrap of so-called post-affidavit evidence claimed by the government is Terrazas' testimony that petitioner urged his union brethren to read the *Daily People's World*. (G. Br. p. 28, n. 11.) But this proves neither membership nor affiliation. This Court rejected such evidence as proof of affiliation in *Bridges v. Wixon*, 326 U. S. 135, 146. Surely it can have no probative value to estab-

[2]Indeed the curious circuitousness of this testimony is most convincingly indicative that the government had no evidence that Jencks continued in the position Ford attributed to him. Ford and Jencks had been, according to Ford, co-members of the State Committee. Ford was competent to testify that Jencks remained a member after August 1949—if he had. The government apparently avoided this simple, direct approach because it would not have produced proof of the prosecution's case.

lish the more formalized relation of membership.[3] Finally, the government claims that there is post-affidavit evidence, other than Matusow's, in the testimony that petitioner spoke "concerning a nation-wide strike to be called in conjunction with the Mexican Miners Union." (G. Br. p. 28, n. 11.) But this testimony was stricken. [R. 353, 355.]

The only post-affidavit evidence having any probative value on the issues of membership and affiliation, therefore, is the testimony of Matusow. All other evidence was pre-affidavit. Given the principle laid down in *American Communications Association v. Douds*, 339 U. S. 382, 414, that past membership or affiliation is no bar to signing the affidavit after a severance of the old relationship, Matusow's testimony was key to the government's case. The prosecutor's observation that Matusow was "absolutely essential" [H. 13] is singularly apt.

It is strange indeed to find the government at this stage of the case attempting to minimize the probative effect of Matusow's testimony. (G. Br. pp. 37, 40, 41.) The Do-Day conversation (see Pet. Br. 12, 13) was especially damning and inflammatory. There Matusow attributed to Jencks a remark that the latter would convey the Do-Day notion to his "fellow Party members in Silver City," and that "he and other Communists" were conferring with the Mexican Miners Union on means for joint action to cut off or slow down copper production for the Korean war effort. It would be difficult to conceive of an ad-

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[3] It is difficult to divine what the government claims for the Terrazas testimony that petitioner asked his union members not to require the officers to sign the non-Communist affidavits. (G. Br. 28, n. 11.) The government concedes that it is "pre-affidavit". Surely opposition to signing these affidavits cannot support an inference of Party membership or affiliation.

mission of membership so explicit or a description of conduct more likely to arouse patriotic fervor.

It is plain that the entirety of Matusow's testimony was offered to relate four incidents in which Jencks purportedly made admissions of Communist Party membership, and the Do-Day conversation was only the most outspoken. (See Pet. Br. pp. 12, 13.) Unless the evidence had this purpose and effect, it had no place in the record at all. The government's assertion that at the trial Matusow did not "state that petitioner was a member of the Communist Party, or that petitioner had said that he was a member of the Communist Party" is unashamed cavil.

(c) Petitioner's Request at the Trial for Matusow's Reports Should Have Been Granted on This Record.

In brief, the record discloses a narrowly drawn request for production to the trial judge of certain prior statements of the witness. The trial judge was asked to inspect the statements and give to the accused only the portions that had relevance to impeach the witness. The request was made on the cross-examination of the witness whose testimony alone gave colorable sufficiency to the government's case.

The government seeks to justify denial of this request on the ground that it lacked the foundation of a prior showing of inconsistency between the statements and the trial testimony. Its assertion that at the trial "no attempt whatever was made to demonstrate that the prior statements of the witness were contradictory of his present testimony (G. Br. 29) is untrue, and petitioner has made no such concession. On the contrary, an effort was made to develop such contradiction which was frustrated *in*

limine by the witness' answer. This matter has been fully elaborated in our Opening Brief (p. 32) and need not be repeated.

The issue thus presented, is whether when the witness can neither affirm nor deny the existence of contradiction between his prior statement and his testimony, the defendant is to be deprived of the opportunity for impeachment. As we pointed out in our Opening Brief (pp. 31, 32), this kind of frustration could result from a loss of recollection which is either genuine or feigned. It would seem an unusually harsh rule that would deny an accused the opportunity for impeachment of the government's key witness when that witness, for whatever reason, is unable to say that his prior statement contradicts his testimony. For it is difficult to conceive of any other way in which the accused could develop, even in the most general terms, the contents of the prior statement sufficient to show the contradiction.

We cannot believe that the government is serious in urging that the procedure of asking that the prior statement be produced to the court for it to determine the existence of contradiction, would "unduly burden the trial courts". (G. Br. 31.) In the case of Matusow, three, perhaps four, documents were requested. Assuming that each document was three or four pages long, the amount of reading would not be great and the *in camera* inspection could obviously be disposed of during a recess. There would be little chance of other demands upon the court's time in the form of argument since the contents of the documents would not be available to the defense, and neither party would thus be in a position to argue the court's ruling. In any event, whatever interest there may be in lightening the burden of trial judges is overweighed

by the necessity for doing justice and creating the appearance of justice in our criminal courts. Most convictions result in jail sentences. The one here led to a sentence of five years. Human liberty, we submit, is too precious to permit such deprivation upon records where patently reliable instruments for uncovering truth are left unused upon such technicalities as the government here urges. This the more so where as here the witness fairly reeks of unreliability.

The government's argument that under the procedure here urged "the function of establishing the relevancy of the documents would be merely shifted from the defendant to the judge" (G. Br. 31) is wide of the mark. If the government's position were followed, the function of establishing relevancy would be shifted to the suspect witness, for it is only upon his word that his prior statement belies his trial testimony, that production to the court would be permitted. It is doubtful whether in any circumstance the search for truth should rest upon so slender a reed. But surely, in the circumstances of this case, where the word of a professional informer-witness alone determines the accused's guilt or innocence, and his cross-examination has cast heavy shadow upon his credibility (see Pet. Br. 26, n. 9), the search for truth will not depend upon what he will say as to the consistency or inconsistency between his trial testimony and his prior statements. Surely that search will not be halted merely because such a witness claims to have no memory of the contents of his prior statement.

The government seeks to take undue advantage of its sovereign position. We recognize (Pet. Br. 30, 31) that the government has certain limited interests in protecting the confidences of its papers and records. Petitioner's

request for the trial court's inspection of the disputed documents was designed fully to protect those limited interests. It must never be overlooked that in bringing the prosecution the government has waived its privileges as to any documents containing matters relevant to the issues at trial. (*United States v. Andolschek* (2 Cir.), 142 F. 2d 503; *United States v. Beckman* (2 Cir.), 155 F. 2d 580; *United States v. Coplon* (2 Cir.), 185 F. 2d 629.) To that extent, therefore, the government in this case for purposes of petitioner's request here under examination stands in no different posture from that of a private party.

But the nature of the government as sovereign and as a prosecutor casts upon it a greater burden than upon a private party. In this or any other prosecution the government's paramount interest is that justice be done. *Berger v. United States*, 295 U. S. 78, 88, 89. No greater service can be rendered to that end than to further the ascertainment of the facts upon which the individual's life or liberty is to be adjudged. Here it has been shown that the government possesses documents which, regardless of their contents,[4] contain important records related to the very transactions upon which it sought to predicate petitioner's guilt. Unless the government be required to produce them to the trial judge, as here requested, it is positioned to usurp *pro tanto* his authority to determine the scope and admissibility of evidence. For in those premises the government may disclose the papers that aid the prosecution and keep hidden those which harm it. Civilized standards of fair play reject such capricious power in any

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[4]For reasons already indicated, even the failure of the reports to mention the incidents described in the trial testimony would furnish important impeachment on the central question of petitioner's membership or affiliation. (Pet. Br. 27, n. 10.)

official. The trial of criminal charges is not a game of cat and mouse, and the lives and liberty of individuals are not sacrifices to the won and lost statistics of the prosecuting agency.

So gravely does the Second Circuit hold the government's responsibility in these premises, that it makes disclosure to the trial judge a condition of maintaining the action. Once initiated, the prosecution "must be conducted in the open". The government cannot suppress reports which, as here, are "founded upon those very dealings to which the documents relate, and whose criminality they will, or may, tend to exculpate." *United States v. Andolschek* (2 Cir.), 142 F. 2d 503, 506. And so demanding is this obligation that if it is not complied with "the prosecution will fail." *United States v. Grayson* (2 Cir.), 166 F. 2d 863, 870.

It follows from this that the area of discretion left to the trial judge is by no means as extensive or unlimited by legal principles as the government urges.[5] (G. Br. 25, 32.) For under the principles laid down by the Second Circuit, the government must, in circumstances similar to those at bar, turn the documents over to the court. Failure of the court to order it is reversible error. (See *United States v. Andolschek* and *United States v. Grayson, supra, United*

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[5]The principal cases relied upon by the government are inapplicable. (G. Br. 25.) *Goldman* involved a request for direct access by the accused of the "notes and memoranda made by the agents during the investigation" of the case. (316 U. S. at 132.) No such shotgun foray into the government files, necessarily embracing work products of the agents, was sought here. In *D'Aquino* the accused sought direct access to an agent's notes of an interview with another witness. (192 F. 2d at 375.) Petitioner sought no direct access to any document and asked only for the statement of the witness under cross-examination. The *Little* and *Arnstien* cases are discussed below.

States v. Beckman (2 Cir.), 153 F. 2d 580.) The discretion lies not in the power to compel disclosure of the document to the court but rather in determining whether the document has relevance for impeachment or otherwise. *United States v. Cohen, supra; United States v. Simonds* (2d Cir.), 148 F. 2d 177; *United States v. De Normand* (2 Cir.), 149 F. 2d 622. It is not in this area of discretion that the trial court's error lies in the case at bar. Rather it is found in refusing to examine for relevance documents shown to have direct bearing upon those transactions used by the government to prove petitioner's guilt. Upon the foundation here laid we submit the trial court had no discretion to rule as it did. For it closed the door to ascertaining the existence of "relevant and important facts bearing on the trustworthiness of crucial testimony." *Gordon v. United States*, 344 U. S. at 423.

We do not read the decided cases as the government does, and we think that the better reasoning is that under circumstances similar to those here the trial judge is called upon to require production of the prior statements. We think it is true that in the *Krulewitch* case (145 F. 2d 76) the witness did in fact concede that her prior statements contradicted her trial testimony. However, this appears from the dissenting opinion of Judge Clark, and not from the majority opinion. It would appear from Judge Learned Hand's opinion that the witness' admission in this respect was of no consequence. Indeed, as he points out (145 F. 2d 79), it was impossible for the accused to develop the contradiction other than in the most general and therefore useless terms without access to the statement itself. That Judge Hand and his court regard the *Krulewitch* case as in effect holding that a prior showing of contradiction is not necessary to obtain production

of the prior statement to the court appears from the formulation in a subsequent opinion *United States v. Cohen* (2 Cir.), 145 F. 2d 82, 92. From that case it would appear that the trial judge is called upon to require production to him and to examine prior statements of the witness taken by the government and to make them available to the defense where his inspection shows the contradiction. This, it was stated in the *Cohen* case, was the principle laid down in *Krulewitch*:

> "We have very recently considered this question in United States v. Krulewitch, 145 F. 2d 76, and we need not repeat what we there said. We held that when statements are taken by the prosecution *which appear upon inspection by the judge to contradict* the testimony of the witness when he is called at the trial, the accused should be allowed to inspect them, since he cannot otherwise impeach the witness." (145 F. 2d 92.) (Emphasis added.)

While Judge Denman in *Fisher v. United States* (9 Cir.), 231 F. 2d 99, 104, did not cite the opinions of the Second Circuit, his holding that the government records should be produced directly to the defendant was made without reference to any prior showing of inconsistency. Indeed, it is inescapable from the opinion that no such showing was made in the *Fisher* case. We have already directed the Court's attention to district court rulings where the prior showing of inconsistency was either specifically held unnecessary or its absence not even noticed. (Pet. Br. 30, 36, n. 18.)

United States v. Ebeling (2 Cir.), 146 F. 2d 254, actually supports petitioner's position. Demand for production of the document led to its being shown to the court, and inspection by the defendant was refused because the

court found no contradiction. The appellate court refused to reverse since the defendant had not requested that the statement be included in the record on appeal. (146 F. 2d, at 256, 257.)

United States v. De Normand (2 Cir.), 149 F. 2d 622, is to similar effect except that there the prior statement was incorporated in the record on appeal and the appellate court affirmed the trial judge's judgment that the contradictions were so inconsequential as not to justify inspection by the defendant.

D'Aquino v. United States (9 Cir.), 192 F. 2d 338, and *Christoffel v. United States* (C. A. D. C.), 200 F. 2d 734, do not deal with prior statements of the witness and have no bearing at all.

Two of the government's authorities appear to support its position. *Arnstein v. United States*, 296 F. 946, however, is distinguishable on its facts although not in its reasoning. The document involved in that case was in the possession of a state official, the district attorney of New York County. The bringing of a prosecution by the United States did, therefore, not waive the privileges possessed by the state government. For that reason nonproduction could be supported in that case without compelling the same result here. *Little v. United States* (8 Cir.), 93 F. 2d 401, is directly contrary to petitioner's position here. It is to be observed, however, that this is an early case which, together with others of similar vein, including *Arnstein*, were before Judge Hand's court in *United States v. Krulewitch* and were therefore considered and rejected by that court. (See 145 F. 2d at 81.) Since *United States v. Lightfoot* (7 Cir.), 228 F. 2d 861, is now before this Court on this issue among others, it is of little weight here. From the opinion it would appear that the

holding is distinguishable because of the timing of the defendant's request for production of the documents to the court.

In *Scanlon v. United States* (1 Cir.), 223 F. 2d 382, the court enunciated the principle urged by the government here, that the accused must develop the existence of contradiction between trial testimony and prior statement before the document will be ordered produced. But that was with reference to a motion for direct access by the accused. Here we agree that before the accused inspects the document the contradiction must appear. The issue is whether that contradiction must appear before the trial judge is required to examine it. The case does not aid the government. The *Scanlon* case rather graphically illustrates the extent to which the government's position here would frustrate an important phase of the search for truth. There, as the Court of Appeals has it, the witness "stated that *as far as he could recollect*" his testimony on the witness stand was not different from that contained in the report. There is a quality of bootstrap in reasoning that the court should not examine the most reliable gauge of a witness' recollection and accuracy because his untested recollection of his prior statement fails to show a contradiction between it and his testimony. This recollection may indeed be an honest one, but not reliable because of the passage of time. That in cases of the career informers, such as Matusow, it may well be a dishonest one is too apparent to need argumentation. Truth is too precious and its ascertainment too needful in the administration of justice to permit the door to its sanctuary to be so easily barred. Especially is this true where, as here, the government knows what the statement contains. If there is no contradiction the government cannot

be injured while the appearance of justice is enhanced. If there is a contradiction justice demands that it be made known, and the duty of the prosecutor in this regard compels him to take the lead to that end. As was said in *Fisher v. United States, supra,* p. 104, "one would expect the Government to have been glad to produce [the statements]". It has nothing to gain from concealing them unless it be the unjust conviction of petitioner.

(d) Petitioner's Request, at the Hearing, for Matusow's Reports Should Have Been Granted on This Record.

Apparently conceding that under *Ellicott v. Pearl,* 35 U. S. (10 Pet.) 412, production of the statements could be compelled "to corroborate a recanting witness' testimony which is in conflict with the witness' trial testimony" (G. Br. 36), the government urges that in addition to Matusow's trial testimony being unimportant, his recantation was only tangential to the trial testimony. (G. Br. 37.) This, we submit, is plain distortion of the record, for not only did Matusow at the trial testify to facts upon which guilt was predicated, but at the hearing he recanted specifically those facts.

Anent the government's assertion that at the trial Matusow did not "state that petitioner was a member of the Communist Party, or that petitioner had said that he was a member of the Communist Party" (G. Br. 37), we have already shown that the Matusow testimony could have had only the purpose and effect of showing petitioner's membership in the Communist Party at a time after the affidavit was signed. (*Ante,* subd. (b).) When in recanting Matusow said that he never had any discussion with petitioner concerning "Communist Party membership or Communist Party activities" (see Pet. Br. 18, 19) and

then proceeded to denounce as false every reference in every incident of his trial testimony to membership in or activities in or on behalf of the Communist Party (see Pet. Br., App. I), he directly and unequivocally contradicted his trial testimony. And that contradiction went to the central issues of the case: membership in and affiliation with the Communist Party.

The kernel significance of this lies in relation to the motion for production of Matusow's contemporaneous informer reports at the hearing. There Matusow said none of these reports would show that he had "any conversations that established that Jencks was a Communist," that he "never at any time identified Mr. Jencks as a member of the Communist Party in the reports" and that he had no way of knowing who were or were not Communists, including Mr. Jencks." (See Pet. Br. 21.) The suggestion that this testimony "failed to develop any inconsistency whatever between Matusow's testimony at the hearing and at the trial, or any revelant evidence going to the issue of [petitioner's] innocence" (G. Br. 37) thus borders on fantasy. At the hearing Matusow recanted the trial testimony that had been essential to Jencks' conviction, to wit, admissions of membership as of a time after the affidavit was signed. He reinforced this recantation by saying that his contemporaneous reports contained no references to the incidents as he described them at the trial. The government overlooks the principles that under the circumstances in which these reports were prepared[6] the mere failure to report these incidents would amount to an "assertion of their non-existence". 3 Wigmore, *Evidence*, p. 733, sec. 1042.

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[6]His instructions and practice were to report all incidents as "completely" as he could and to include "everything that I remembered I saw and heard". [R. 290, 291.]

The contradiction between the trial testimony and the recantation and the contradiction between the former and the contemporaneous informer reports was thus complete, precise and directed at the central issues of the case. Since it was claimed that the recantation was a fabrication corruptly induced, the F.B.I. reports were manifestly proper rehabilitation. If the reports showed no more than the foundation laid by the recantation, namely, that there were no reports of conversations with Jencks dealing with Communist Party membership or activities, the resulting inference of "assertion of their non-existence" would have been strong impeachment. It is not unreasonable to assume that if Matusow had obtained nothing from Jencks concerning the Communist Party, he would have reported his failure to get such information or not have mentioned Jencks at all, and from this the trier of the facts could well infer that, by the best evidence available, Matusow fabricated all four incidents which he related at the trial.

It is difficult to perceive how a legal discretion could properly be exercised at the hearing not to examine the statements in question. Here the only issue was Matusow's truthfulness. This the government raised. This the judge had a special responsibility to determine in order to protect his judgment on the one hand and to keep unsullied the processes of justice on the other. The prosecution concealed and the judge ignored the only item of evidence that was contemporaneous with the events narrated in the testimony and least affected by the complex and hydraulic pressures of Matusow's self-interest and shifting partisanship.

The government seeks affirmance of the trial court's rulings on the ground that the error, if any, was harmless because the evidence was sufficient to support the convic-

tion and that petitioner "has abandoned in this Court" any contention to the contrary. (G. Br. 39.) Petitioner has abandoned no substantial attack upon the judgment here. He has selected the grounds for this review so as best to present the issues to this Court. Aside from the testimony of Matusow, which requires separate treatment on account of the recantation, the requests for production of his contemporaneous reports and his role as professional informer-witness, the evidence is, as already demonstrated, all pre-affidavit. The sufficiency of pre-affidavit evidence is an inseparable part of petitioner's position here. It is raised by way of attack upon the trial court's instructions which were so vague and lacking in guidance as to permit the jury to find membership and affiliation as of April 28, 1950, from insufficient evidence ranging in date from nine months to four years prior to the affidavit. (Pet. Br., Point Two, subd. (b), pp. 55-60; Point Three, subd. (c), pp. 75-76.) Necessarily contesting the sufficiency of the evidence is petitioner's contention that the instruction on affiliation permitted the jury to find that relationship without reference to the element of a close working alliance to effecuate proscribed objectives. (Pet. Br., Point Three, subd. (b), pp. 71-75.)

This attack is predicated on the thesis of *Bollenbach v. United States*, 326 U. S. 607, that no matter how strong the appellate court may regard the evidence, the Sixth Amendment requires that the accused's guilt or innocence be determined by a jury properly instructed.

(e) The Memorandum of Matusow's Conversation With the F.B.I. Agent at Santa Fe Should Have Been Produced as Requested.

It is to be emphasized here again that this document is tantamount to Matusow's own statement. According to the testimony he spoke to the agent; the latter wrote down

what was said and showed it to Matusow, who approved of it. [R. 67-69.] The government's construction of Matusow's version of what he said to the F.B.I. agent is not a little disingenuous. It urges that the portion of the remark, "I didn't feel my testimony was honest" was merely an explanation of Matusow's "subjective motive" for telling the agent of his reluctance to testify. (G. Br. p. 35, n. 18.) On the contrary this was part of what Matusow said he had told the F.B.I. agent. The question was "What did you tell the F.B.I. agent?", and the whole answer was in response to that. The questioned sentence is followed by the words ,"Or, in substance, that is what I told him . . ." [H. 68.] Moreover in the context of the cross-examination, it is plain that the words, "I didn't feel my testimony was honest" was intended as part of what Matusow told the agent. For the line of interrogation was directed to instances where Matusow had told others he had testified falsely. [H. 66.] That petitioner's counsel in the stress of the hearing forgot this testimony [G. Br. 35; H. 755-756] proves nothing. Counsel often have lapses of memory in such circumstances, and his comments are of no value in determining Matusow's meaning. It is noteworthy that his objection was overruled [H. 756]; perhaps this indicates that the trial judge agreed with our interpretation of Matusow's testimony.

In light of these facts, therefore, petitioner's request for production of the memorandum was proper for the reasons stated in his Opening Brief (pp. 39-42). Indeed it was necessary. For here is presented not merely an opportunity to rehabilitate Matusow. The contents of this document may well indicate whether the prosecutors knew or should have known that Matusow's trial testimony might be perjurious as the latter now claims.

POINT TWO.

The Government Has Offered No Tenable Basis for Sustaining the Instruction on Membership.

In our opening brief it was urged (Pet. Br. 44-48), as we conceive this Court has held,[7] that the concept, membership in a voluntary association, has no clear meaning forming part of the general understanding. For this reason, of course, it was essential that the trial court provide guidance to the jury. One method, and this seems to be in accord with the approach generally accepted in the cases,[8] is to define the status in terms of the formal requirements prescribed by the association itself. As was pointed out in *Fisher,* this rubric would afford the accused elemental fairness because he could then measure his denial by a clear objective test, This it would seem is the minimum that can satisfy the rule laid down in the *Douds* case, that "punishment is restricted to acts done with knowledge that they contravene the statute" and "no honest, untainted interpretation . . . is punishable." 339 U. S. at 413.

The government offers no applicable authority to the contrary. *Galvan v. Press,* 347 U. S. 522 (G. Br. pp. 45-49) held simply that where the evidence contains the alien's testimonial admission that he knowingly consummated the act of joining the proof of membership (as of any time after entry—there 36 years) was sufficient. The case would doubtless support a jury instruction to the effect that if the jury believed the accused's testimony that he had joined the Party at the solicitation of a

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[7] *Lanzetta v. New Jersey,* 306 U. S. 451, 458.

[8] Including those dealing with Communist Party membership. *United States v. Reimer* (2 Cir.), 79 F. 2d 315; *Fisher v. United States* (9 Cir.), 231 F. 2d 99.

Party organizer, the jury could conclude that at some time in his life the accused had joined the organization and had done so knowingly.

Here the question is entirely different. For the government had to prove knowing falsity in denying membership on a specific date. There was no testimonial admission of joining at any time, and the evidence of conduct antedated the crucial date by long periods of time. None of that evidence pertained to an act of joining. Neither the holding in *Galvan* nor the instruction it would sustain reaches the issues here. *Galvan* offers no light on the significance of attending meetings, considered alone, although the instruction here permitted a finding on that factor by itself. Nor does it suggest whether isolated attendance or desultory or a long and persistent course of attendance is necessary. Nor does it indicate whether attendance at two widely separated meetings in 1946 or four in 1947 or two in 1948 or five in 1949 or any one or combination of these has any probative bearing on petitioner's membership or knowledge of his own membership in April 1950. The holding of this Court in *Douds*, 339 U. S. at 413-414, robs such evidence, standing alone, of any probative force to show membership as of a time some nine months after that evidence last speaks.

It is claimed that the *Galvan* case "enunciated" a "pattern" which was followed by the evidence and the instructions in the case at bar. To support this the government summarizes only the pre-affidavit evidence. (G. Br. 48.) *Galvan* enunciated no pattern. It is a holding necessarily limited to its own facts. The facts here bear no resemblance to the *Galvan* facts because the all-important testimonial admission is lacking. Nor does the disputed instruction here follow the reasoning of *Galvan*

in any particular. For aside from the fact that it permitted a finding of membership on attendance at meetings taken alone, the instruction here left the question at large upon "all other evidence . . . which bears or may bear upon the question . . ." [R. 415, 416.] *Galvan* specified the evidence sufficient for its narrow purposes (347 U. S. at 528, 529); it does not stand for the proposition that jurors unlearned in the law may create their own standards and select the evidence to suit themselves.

Nor does *Hupman v. United States,* 6 Cir., 219 F. 2d 243, assist the government. The instruction there given, while detailing more factors, has essentially the same fatal lack of guidance and a similar concluding clause leaving the whole issue at large upon the evidence as a whole. The opinion of the Court of Appeals contains no reasoning which provides assistance in analyzing the issue here or understanding that court's mental processes. The facts of the *Hupman* case are significantly different from those here. For there, two informers testified that shortly *after* signing the affidavit the accused accepted instructions from a Party leader to conceal his membership and participate in a "Taft-Hartley group." 219 F. 2d at 247.

The government fails to meet our contention that the membership instruction permitted and indeed invited the jury to base its finding on pre-affidavit evidence alone. (G. Br. 51, 52.) It first asserts that there was also post-affidavit evidence. We have already shown (Point One, *ante*) that aside from Matusow there was no post-affidavit evidence that had any probative effect on the issues of membership. But if there were such evidence, it could not cure an instruction permitting a finding upon pre-affidavit evidence alone. That the instruction here had that effect is indisputable from its face. That it in-

vited such a finding is obvious from the fact that attending meetings and holding office—the only criteria specifically mentioned—are found only in the pre-affidavit evidence.

Nor is the error cured by the instruction to base the verdict upon "all" the evidence. This was told the jury in the membership instruction [R. 416] as well as generally. [R. 417.] To tell a jury to find a difficult and complex relationship from all the evidence is to give no guidance and invite the employment of the personal notions of the jury. That "all the evidence" satisfied the court below (or may satisfy this Court) of petitioner's membership on the crucial date upon such standards as either court may apply avails nothing. For the least petitioner was entitled to was the verdict of a jury properly instructed. *Bollenbach v. United States*, 326 U. S. 607, 613-615.

It may well be that proof of compliance with the formal requirements of membership cannot include specific proof of the "act of joining." But it would then seem necessary to offer proof, essentially circumstantial in nature, that would show a course of conduct from which it could be inferred that such an act of joining had in fact been consummated. To be probative it would seem that this evidence should pertain to conduct which, by the organization's requirements, are necessary to continue membership. The instructions to the jury, then, should afford guidance as to the significance of this conduct as evidence of the "crucial" act of joining and remaining a member. In these respects a course of conduct rather than isolated acts would be determinative, and the instruction should give appropriate direction to the jury's evaluation of those factors for purposes of finding an act of joining and

remaining a member until the critical date. Here also admissions by the accused of membership have probative value, and instructions as to this would seem necessary to provide adequate yardsticks for the jury. . . .

None of these elemental necessities can be spared here because of what the government calls the "clandestine organizational structure of the Party." (G. Br. 46, 47.) If this were part of the case against petitioner, due process requires that he have a chance to meet it. Congressional findings or judicial determinations in other cases do not bind petitioner at his trial. The evidence on these matters in this record is singularly sparse and totally unconnected with petitioner. Contrary to the government's assertion, there was no evidence that the Party "to assure maximum efficiency in carrying out its aims, admonished members to conceal their membership." (G. Br. 47.) The record documentation furnished by the government is merely to the effect that "we were to rather take the background and not be too conspicuous in our activitiy and our work." [R. 110.] There is a vast difference between concealment and inconspicuousness. Ford testified only that in the period 1949-1950, "Party members . . . usually did not carry a card. [R. 132.] This is quite different from a statement that the Party "did not issue membership cards." (G. Br. 47.) He also said that he "didn't see any" membership rolls. [R. 133], which is a far cry from the claim that the organization "refrained from keeping membership rolls." [R. 47.] None of this is in any wise connected with petitioner. So far as this record is concerned, he knew nothing of it. Eckert's testimony about memberships at large and the failure to keep minutes related to 1947. He did not say that Jencks held the former or knew of either practice. [R. 335-336.]

No evidence in this record serves to justify any dispensation from the usual method of proving membership in terms of the conditions observed by the organization and the individual. Still less is there any reason why the inference of membership can be based upon a jury's unfettered selection of essentially unrelated incidents, varying only in the degree of their remoteness from the critical date, April 28, 1950.

POINT THREE.

The Government Has Offered No Tenable Basis for Sustaining the Instruction on Affiliation.

The government fails to distinguish *Bridges v. Wixon*, 326 U. S. 135. It claims that the case is different because the statute there proscribed affiliation with an organization having unlawful objectives: advocating overthrow of the government by force and violence, whereas here the statute proscribes affiliation with an organization by name: the Communist Party. It also asserts that the statute here does not punish affiliation with the Communist Party.[9] (G. Br. 51, 58.)

But the central thesis of *Bridges* is that to proscribe mere affiliation without regard to purpose abridges important First Amendment liberties. That association for the propagation of ideas is an exercise of this Amendment's guarantees is by now a commonplace. (*Wieman v. Updegraf*, 344 U. S. 183, 191; *Cantwell v. Connecticut*, 310 U. S. 296, 303; *Thomas v. Collins*, 323 U. S. 516, 539; *United Public Workers v. Mitchell*, 330 U. S. 75, 94;

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[9]Neither did the statute in *Bridges*. It simply made the alien deportable in a civil proceeding. *Carlson v. Landon*, 342 U. S. 524, 537.

Bowe v. Commonwealth, 320 Mass. 230, 252, 69 N. E. 2d. 115, 130; VI Encyc. Soc. Sci., p. 449, "Freedom of Association" (Harold J. Laski).) Citizens have a right, fully protected, to cooperate with the Communist Party for lawful objectives such as the defeat of legislation in the Congress, elimination of racial and national discrimination, election of candidates for public office. To impute to them on that account unlawful purposes or activities would present a case of imputed guilt far more enormous than those condemned in *Schneiderman v. United States*, 322 U. S. 665; *Baumgartner v. United States*, 322 U. S. 665; see also *Wieman v. Updegraf*, 344 U. S. 183, 190.

The statute here has as its objective not the elimination of aliens who belong to associations propagating proscribed doctrines but the insulation of the trade union movement from those who would use their leadership therein to call political strikes. Douds, 339 U. S. at 389, 393. Whether or not the imputation of that objective to Communist Party *members* contravenes the principles of *Schneiderman*, *Baumgartner* and *Wieman*, is not presented on this record. But to ascribe that objective to persons only on the basis of cooperation with the Communist Party for lawful objectives would mark a grave surrender of cherished democratic liberties. For not only would expression be curtailed for Communist and non-Communist alike, with parallelism of utterance offering the key to proscription, but the former would in effect be converted into pariahs, excluded by name alone from the ideological marketplace, quarantined as infectious. The definition of affiliation laid down in *Bridges* was dictated not by the language of the statute but the necessities of free speech and due process. 326 U. S. at 142-148. Affiliation as there construed delineates, not the bounds of a single

statute, but the permissible scope of the term when used to delimit a relationship which the state would forbid. The government's position here would bring the statute into direct conflict with these guarantees.

Significantly enough the same question was presented in *Fisher* and decided adversely to the government. (231 F. 2d at 108.) The government did not distinguish *Bridges* to the satisfaction of the Ninth Circuit and failed to seek review here.

POINT FOUR.

The Government Has Presented No Justification for the Failure to Instruct on Credibility of Informers.

The government is correct that the issue here pertaining to the use of informers is one of credibility.[10] (G. Br. 60.) Our complaint is that the trial court's instruction provided no guide to the probative effect of the evidence that these informers had plied their trade for money. For all that was given the jury, this fact could have weighed in their favor. It is not our contention that the trial court erred because it did not adopt petitioner's "precise language". (G. Br. 61.) The error lay in the failure to adopt any language that conveyed the idea that those who inform for pay are to be scrutinized carefully before being relied on.

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[10]The practice of using such persons in political cases may well reflect a "dirty business" more stultifying to a free society and degenerating to the administration of justice than wire tapping. See, *e.g.*, *Chafee, The Blessings of Liberty* (1956), pp. 95-97; *Editorial*, N. Y. Times, July 8, 1954; Pet. Br. 85-87. The question, of course, is not reached here, although Matusow's history as evidenced in the record on the motion for new trial here and in the *Flynn* case (130 F. Supp. 412) rather conclusively illustrates the point. See also, *Communist Party v. Subversive Activities Control Board*, 351 U. S. 115, 121, 124.

Since these informers peddled only uncorroborated oral admissions, the notoriously malleable stuff of the trade and by nature the weakest of evidence, (4 Wigmore, *op. cit.*, pp. 466-477, section 2094) the necessity of the instruction is manifest.

The government's attempts to distinguish *Fletcher v. United States* (C. A. D. C.), 158 F. 2d 321, on the ground that the informer there was the sole witness, is predicated upon a misapprehension of the evidence here. We have already shown (*ante*, Point One) that Matusow's testimony was the only post-affidavit evidence having any probative value and thus the only evidence upon which, under *Douds*, a conviction could be sustained. For this reason the crucial character of Matusow's testimony required the instruction with the same force as in Fletcher.[11]

Finally, the government argues that the jury was sufficiently instructed on the credibility of these informers by the cross-examination and closing argument of petitioner's counsel. (G. Br. 62.) It seems hardly necessary to observe that it is the function of the court, not counsel, to give the law to the jury, and that this is a duty as to all issues of law presented by the evidence. *Bird v. United States*, 180 U. S. 356, 360; *cf. Bruno v. United States*, 308 U. S. 287; *Bollenbach v. United States*, 326 U. S. 607, 613. In fact, it is reasonable to assume that the court's failure to furnish a guide to the jury in evaluating the impact of the informers' role on their credibility, coming after counsel's argument, was construed as a repudiation of that argument, and thus additionally prejudicial to petitioner.

[11] The importance of Ford's testimony to the court below was discussed in our opening brief. (Pet. Br. 42, 43.)

Conclusion.

For all reasons herein given, the judgment of conviction should be reversed.

Respectfully submitted,

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